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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1167

C. E. HESTER, ET AL., *Petitioners*

v.

ZELMA WYCHE, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 431 F.2d 791. The opinion of the United States District Court for the Western District of Louisiana is reported at 273 F. Supp. 131.

JURISDICTION

The judgment of the Court of Appeals was entered August 25, 1970, and rehearing was denied by that court October 6, 1970. The petition for certiorari was filed December 26, 1970. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

The respondent, a prisoner in state custody, filed a habeas corpus petition in federal district court challenging his state conviction on the ground that the underlying conduct was privileged from prosecution by Section 203 of the Civil Rights Act of 1964, 42 U.S.C. 2000a-2. The district court dismissed the petition without a hearing. The question presented is whether the Court of Appeals properly remanded the case for an evidentiary hearing on the basis of its conclusion that respondent's state court trial had not fully resolved the factual questions involved in his claim.

STATUTE INVOLVED

Section 203 of the Civil Rights Act of 1964, 42 U.S.C. 2000a-2, is set forth in the Petition at pp. 2-3. Section 201(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000a(a), provides:

> "All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin."

STATEMENT

Respondent Zelma Wyche is president of the Madison Parish Voters' League, a local organization in Tallulah, Louisiana devoted to securing equal rights for black people.[1]

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[1] Since the events involved in this case, respondent Wyche has been elected chief of police of Tallulah, the parish seat of Madison Parish. See New York Times, Oct. 3, 1969, p. 25, col. 1 (city ed.). Respondent took office on June 26, 1969, after a special election. An earlier election had been voided in federal court on the ground that parish officials had deprived respondent, and black voters in Tallulah generally, of rights secured by the Voting Rights Act of 1965. *United States* and *Wyche* v. *Post*, 297 F. Supp. 46 (W.D. La. 1969).

In the early evening of July 28, 1966, respondent and several other black citizens entered Bill's Highway 80 Truckstop, a "place of public accommodation" as defined in Section 201 of the Civil Rights Act of 1964, 42 U.S.C. 2000a, for the purpose of securing service. Although the restaurant had traditionally been restricted to white patrons, respondent and his companions were served and then departed.

Later that evening, respondent was told by Reverend T. H. Turner, a black citizen and a member of the Voters' League, that he had just been refused service at the same restaurant because of his race. Respondent and several League members returned to the restaurant to determine whether Reverend Turner would be served. Respondent entered the restaurant and asked to see the manager, who was outside at the adjacent filling station.

At this point, a white patron of the restaurant, Dr. John Monsell, began to argue with respondent. Both men went outside, where some of the black citizens who had accompanied respondent gathered. Monsell testified that he was punched and kicked from behind by someone in the crowd. It is undisputed that respondent at no time touched Monsell. As a result of this incident, the state alleged that respondent had "procured" the blows against Monsell and respondent was tried and convicted of simple battery.[2] He was sentenced to four months in jail and fined $200.

After the Supreme Court of Louisiana denied review of his conviction, 249 La. 757, 190 So. 2d 915 (1966), respondent filed a petition for habeas corpus in federal district court, alleging that his conviction was invalid under Section 203 of the Civil Rights Act of 1964, in that it constituted punishment for the exercise of rights of equal

[2] On the same facts, respondent was also charged with aggravated burglary. Respondent removed that charge to federal court; an order of remand by the District Court was reversed by the Court of Appeals. *Wyche* v. *Louisiana*, 394 F.2d 927 (5th Cir. 1967).

access to public accommodations guaranteed by Section 201 of that Act.[3] He sought an evidentiary hearing to determine the facts relevant to his claim. Without holding an evidentiary hearing, the District Court denied the petition. The Court of Appeals remanded the case, holding that the state court trial had not resolved all the factual issues relevant to respondent's Civil Rights Act claim, and thus that the District Court had erred in failing to hold an evidentiary hearing. It is from the order of remand for the receipt of evidence that petitioner seeks certiorari.

ARGUMENT

The petition raises no important question of federal law. It consists largely of an attack on the Court of Appeals' analysis of the facts in this particular case—that is, the court's conclusion that respondent's trial in state court failed adequately to resolve the factual issues involved in determining whether the conduct for which he was convicted was protected by the public accommodations provisions of the 1964 Civil Rights Act. Moreover, the interlocutory nature of the ruling—a remand for an evidentiary hearing—renders it particularly inappropriate for review by this Court. Finally, the Court of Appeals correctly decided the narrow question before it.

1. The Court of Appeals' decision is based upon familiar principles of law, unchallenged by petitioners. Section 201 of the 1964 Civil Rights Act establishes a right of equal access to places of public accommodation for all persons regardless of race. Section 203 of the Act provides that no person may "punish or attempt to punish" any person for exercising Section 201 rights. This Court has held that under Section 203 "nonforcible attempts to gain admittance to or remain in establishments covered by the Act, are immunized from prosecution. . . ." *Hamm* v.

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[3] Respondent also alleged violations of due process in the denial of a jury trial under Louisiana law; and because he was convicted on "no evidence", cf. *Thompson* v. *Louisville*, 362 U.S. 199 (1960).

City of Rock Hill, 379 U.S. 306, 311 (1964). This immunity may be enforced in the federal courts by federal removal of state prosecutions before trial, *Rachel* v. *Georgia*, 384 U.S. 780 (1966); or, as in this case, by federal habeas corpus, *Tolg* v. *Grimes*, 355 F.2d 92 (5th Cir. 1966) *cert. denied* 384 U.S. 988 (1966); *cf. City of Greenwood* v. *Peacock*, 384 U.S. 808, 829 (1966).

Respondent argued in the District Court and the Court of Appeals that when a state conviction is challenged on federal habeas on the ground that conviction amounts to punishment for conduct protected by Section 201, Section 203 should be construed to require an evidentiary hearing in federal court where there is support for this allegation in the state court record.[4] The Court of Appeals did not accept the full scope of this argument, but, in determining whether or not respondent was entitled to an evidentiary hearing, applied the traditional standard of *Townsend* v. *Sain*, 372 U.S. 293 (1963)—whether the merits of the factual dispute were resolved in a full and fair state hearing.

Petitioners do not challenge the *Townsend* standard. Their sole difference with the Court of Appeals involves the application of this standard to the particular state proceedings involved in this case. As the Court of Appeals

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[4] Where a state criminal defendant claims he is being prosecuted for the exercise of Section 201 rights, he may remove his case to federal court under 28 U.S.C. 1443(1), see *Georgia* v. *Rachel*, 384 U.S. 780 (1966); or he may seek a federal injunction against the prosecution, see *Dilworth* v. *Riner*, 343 F.2d 226 (5th Cir. 1965). Under either form of pre-trial relief, the state defendant is entitled to an evidentiary hearing in federal court on his claim that the conduct for which he is being prosecuted is privileged by Section 201. It would be completely at odds with the proper relationship between federal and state courts to hold that a defendant is entitled to a full evidentiary hearing in the federal court if he short-circuits the state processes by removal or injunction, but that he is not entitled to a federal hearing if he first exhausts the remedies available to him at state law.

viewed the record, the state judge's findings, expressed only in brief informal oral remarks, were ambiguous, and could support the conclusion that respondent was held "responsible" for the battery only because he was a leader of the local black community, some of whose members committed battery upon Dr. Monsell in his presence. Petitioners dispute this interpretation of the record. This Court has not normally granted certiorari to relitigate particularized factual disputes of this type.

Petitioners' second "question presented"—"Can a defendant committing a crime of violence be protected by a civil rights shield?"—is not involved in this case. Respondent has never contended that violent conduct falls within the protective scope of the 1964 Civil Rights Act, but has from the outset conceded that if he in fact committed a battery upon Dr. Monsell or caused such a battery by pre-arranged signal to one of his colleagues, his Civil Rights Act claim must fall. Respondent has consistently denied any such violence or procuring of violence on his part and has sought an evidentiary hearing to prove that he did not engage in such conduct. The Court of Appeals ordered just such a hearing, under a mandate clearly recognizing this Court's holding in *Hamm, supra*, that only "nonforcible" attempts to gain access to public accommodations are protected from prosecution:

> "On remand the state conviction must be set aside unless there is evidence presented to justify a finding that Wyche directly counseled, commanded, ordered, or solicited the alleged battery on Dr. Monsell and thereby withdrew himself from the protections of Section 203 of the Civil Rights Act."
>
> (Appendix to Petition at 31-32.)

2. Insofar as the petition challenges the construction given to Title II of the 1964 Civil Rights Act by the Court of Appeals, it is premature. The Court of Appeals made no final determination concerning the application of Sections 201 and 203 to the facts of this case; it merely found

that respondent's petition for habeas corpus made out a prima facie case for invalidation of his state conviction and then remanded the case for an evidentiary hearing to clear up the factual ambiguities left by the conflicting testimony and the unclear findings at the state trial. Even if this case did raise important issues concerning the reach of Title II, those issues would be better reached on full factual record supplemented by findings of fact, after an evidentiary hearing, rather than at the present interlocutory stage.

3. The Court of Appeals correctly determined that respondent was entitled to an evidentiary hearing on his Title II claim. Resolution of that claim turns largely on a determination whether respondent was peacefully pursuing his and his colleagues' rights of nondiscriminatory access to public accommodations, or whether he went beyond the "nonforcible" exercise of those rights and engaged in violence. On this question, the testimony at trial was sharply divided, as Judge Goldberg's opinion for the Court of Appeals demonstrates. Appendix to Petition, at 28. The trial judge did not clearly resolve the conflicting versions of the incident in the rather sketchy oral remarks which accompanied his pronouncement of judgment. He was content, as the Court of Appeals summarizes it, to find "that a battery had been committed and that appellant was 'responsible' for it." *Ibid.* Thus, as the Court of Appeals noted:

> "It is impossible to determine whether the trial court found appellant 'responsible' for the battery because appellant called together a crowd for peaceful civil rights activities which later got out of control, or whether appellant's 'responsibility' had its origin in a deliberate act by appellant ordering others to commit a battery on Dr. Monsell."
>
> Appendix to Petition at 28-29.

In these circumstances, with an unresolved conflict in testimony on the crucial factual issue, the Court of Ap-

peals had no choice but to order an evidentiary hearing. As in *Townsend* v. *Sain*, *supra*, 372 U.S. at 322, the unresolved factual dispute, turning on the credibility of witnesses giving conflicting accounts of the same incident, could not properly be determined on the cold state court record.

4. The remaining points raised by petitioners are without merit. Petitioners assert that respondent agreed to submit his habeas petition on the state court transcript, and hence waived an evidentiary hearing. This claim, based upon a remark in the District Court opinion in the case, stems from a misunderstanding. In his habeas petition, respondent asserted as an alternative ground for relief a claim that the conviction was based upon "no evidence", and hence violated the principles of *Thompson* v. *Louisville*, 362 U.S. 199 (1960). On this question, and on this question alone, respondent's counsel submitted the state transcript. Respondent's counsel pointed this out to the District Court in a letter written after that court's opinion appeared, and appended that letter to respondent's brief in the Court of Appeals. A copy of the letter is attached as an appendix here.

Petitioners further assert that respondent failed to exhaust state post-conviction remedies on the issue on which he was ultimately granted relief by the Court of Appeals.[5] This claim was not raised in the court below until the petition for rehearing, and it is without merit.

Respondent's federal habeas claim was that he had a right to a hearing in federal court on his Title II claim whether or not the facts underlying his claim had been resolved after a "full and fair hearing" in state court. As to that argument—the claim to a federal forum as of

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[5] As to several other issues, including the contention that there was no evidence to support the conviction, see *Thompson* v. *Louisville*, *supra* Note 3, respondent sought and was denied review in the Supreme Court of Louisiana. 249 La. 777, 191 So. 2d 426 (1966).

right—there obviously could be no question of exhaustion before state courts. The Court of Appeals rejected this argument, but treated as subsumed in it the lesser point that the facts underlying the Title II claim in this particular case had not been fully resolved in the state court trial, applying the traditional standards of *Fourcand v. Swin*, *supra*. At that point it would surely have represented a waste of judicial resources for the Court of Appeals to dismiss the habeas petition until respondent had pursued whatever state post-conviction remedies might in theory be available. In any event, there is no provision of Louisiana state law which permits collateral relief on the ground that a state conviction is in violation of federal statutory law. See La. Code Crim. Proc., Art. 362 (1966).

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

September 1, 1967

Honorable Ben C. Dawkins, Jr.
Chief Judge
United States District Court
Western District of Louisiana
Shreveport, Louisiana 71102

Re: Wyche v. Hester, et al.
Civil Action No. 12,429

Dear Judge Dawkins:

In your Opinion in the above style matter, filed August 30, 1967, at page 9 you state that counsel for the petitioner "agreed to submit the matter on the state court record."

The only purpose of the submission of the state court record by the petitioner was to enable the court to consider petitioner's contention that there was no evidence to support the conviction in the state court. If, on the facts, you had sustained this allegation, we would clearly have been entitled to relief under the doctrine of *Thompson v. Louisville*, 362 U.S. 199 (1961).

We did not, however, submit the state court transcript on the issue of petitioner's right to an evidentiary hearing in the federal court, and of course any such thought would be completely inconsistent with our claim in this regard. Although I have not seen the minute entry of December 14, 1966, it should not indicate my submission of the other state court record for any purpose other than that described above.

I would certainly appreciate your considering a brief amendment to your opinion in this regard.

Very truly yours,

Richard B. Sobel

cc: William Schuler, Esq.